FILE COPY

Office - Supreme Court, U.
FILED
MAR 14 1947
CHARLES ELMORE CROPLEY
CLERK

No. 1001

In the Supreme Court of the United States

OCTOBER TERM, 1946

NOWLIN RANDOLPH, PETITIONER

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	4
Conclusion	8
Appendix	9

CITATIONS

Cases:	
Barnett v. *Hines*, 105 F. 2d 96	5
Denby v. *Berry*, 263 U. S. 29	6
Dismuke v. *United States*, 297 U. S. 167	5
Geddes v. *United States*, 38 C. Cls. 428	5
Lynch v. *United States*, 292 U. S. 571	5, 6
Morgan v. *United States*, 115 F. 2d 426	6
United States v. *Beaman*, 61 F. 2d 493	5
Statutes:	
Act of April 3, 1939, as amended, 53 Stat. 557, (10 U. S. C. 456)	4, 5, 9
Serviceman's Readjustment Act of 1944, 58 Stat. 287, Sec. 302 (a) (38 U. S. C. Supp. V 693i (a))	7, 10
Judicial Code (Tucker Act, as amended), Sec. 24 (20) (28 U. S. C. 41 (20))	7, 10 5, 9
Judicial Code, Sec. 145 (1) 28 U. S. C. 250 (1)	5
Miscellaneous:	
Executive Order 8099 of April 28, 1939, as amended by Executive Order 8461 of June 28, 1940 (C. F. R., Cum. Supp., Title 3, pp. 482, 680)	7, 11
S. Rep. 80, 76th Cong., 1st sess	4

734484—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1001

NOWLIN RANDOLPH, PETITIONER

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Texas (R. 31–34), and that of the United States Circuit Court of Appeals for the Fifth Circuit (R. 40–41) have not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on November 15, 1946 (R. 41). The petition for a writ of certiorari was filed on February 10, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a reserve officer can sue in a district court to establish his right to retirement pay on account of alleged disability incident to his military service, where he has not pursued the administrative remedies made available by statute and executive order for the assertion and review of such claims, and in the face of the Tucker Act's specific denial of jurisdiction over "claims for pensions."

STATUTES INVOLVED

The relevant statutes and executive orders are set forth in the Appendix, *infra*, pp. 9–12.

STATEMENT

On March 13, 1946, petitioner, a reserve officer, instituted this action against the United States under the Tucker Act to recover retirement pay, in the amount of $2,300, allegedly due to him in accordance with Section 5 of the Act of April 3, 1939, as amended (R. 4; Appendix, *infra*, pp. 9–10). The complaint was twice amended (R. 8–17, 19–30). In the second amended complaint, filed July 23, 1946, petitioner alleged that for many years prior to September 12, 1940, he was a member of the Officers' Reserve Corps of the United States Army (R. 21); that he served as an officer of the Army of the United States from September 12, 1940, until termination of his active duty on May 13, 1945 (R. 21); that while so serving on the island of New Caledonia in 1942

(R. 22, 25), he became ill "in line of duty" so as to incapacitate him for active service, which "disability and incapacity continues until the present time and is permanent" (R. 22). Petitioner further alleged that he was given various examinations by the Army Medical Corps (R. 25–28); that as a result of a retiring board's finding him "incapacitated for active duty as an incident to his service," he was placed on terminal leave on March 7, 1945 (R. 27); that after the expiration of his terminal leave, he was ordered to report again to a military hospital and did so report (R. 27); that studies then made "* * * again revealed plaintiff's disability * * *" (R. 27); and that, after being thus examined at the hospital, he was on August 22, 1945, ordered to appear before another retiring board (R. 27–28); but that, upon his protest, subsequent orders "were issued relieving him from duty as of August 1, 1945, such orders reciting that his relief from active duty was 'not by reason of physical disability'" (R. 28).

The Government moved to dismiss on the ground that the claim was one for a gratuity and the suit was one as to which the court lacked jurisdiction (R. 7, 18, 31–32). After hearing, the district judge granted the motion and ordered the action dismissed (R. 31–34, 35). On appeal, the judgment of the district court was affirmed *per curiam* (R. 40–41).

ARGUMENT

Both courts below held that petitioner's suit must fail for want of jurisdiction, since the United States had not consented to be sued in respect of claims to establish a right to retirement pay arising out of disability incurred in military service. In addition, the district court held the suit barred because it was one for a pension. We think that the judgments below were correct on either of these grounds.

1. The purpose of the provision of Section 5 of the Act of April 3, 1939, under which petitioner claims, was " * * * to accord to * * * Reserve officers and to the enlisted men of * * * the Reserve called into the Federal service the same treatment as that accorded to the officers and enlisted men of the Regular Army in connection with pensions, compensation, retirement pay, and hospital benefits." S. Rep. 80, 76th Cong., 1st sess., p. 7. Being thus assimilated to an officer of the permanent establishment,[1] petitioner stands on the same footing as an officer of the Regular Army seeking to assert a claim for retired pay. Such retired pay involves no contributions by the officer from his active duty pay;

[1] See also the Senate Committee's characterization of Reserve Officers on active duty as "a pool from which appointments in the Regular Army may be made," S. Rep. 80, 76th Cong., 1st sess., at p. 7, and Section 7 of the Act, which gave Reserve Officers on active duty a high priority for appointments in the Regular Army.

it is a gratuity (*Barnett* v. *Hines,* 105 F. 2d 96, 99 (App. D. C.); *United States* v. *Beaman,* 61 F. 2d 493 (C. C. A. 5)), "an honorary form of pension" (*Geddes* v. *United States,* 38 C. Cls. 428, 445), which is "paid by the government in recognition of past services in the Army or Navy" (*Dismuke* v. *United States,* 297 U. S. 167, 170). The statutory privilege of retirement pay creates no vested rights and involves no enforceable agreement. *Lynch* v. *United States,* 292 U. S. 571, 577. Jurisdiction to entertain such claims is expressly excluded from the Tucker Act consent to be sued; they are cognizable neither in a district court nor in the Court of Claims. (Judicial Code, Sec. 24 (20); 28 U. S. C. 41 (20), *infra,* p. 9. See also Judicial Code, Sec. 145 (1); 28 U. S. C. 250 (1).

Contrary to petitioner's contention (Pet. 8, 11), there is no conflict with *Dismuke* v. *United States,* 297 U. S. 167. That case involved, not the retired pay of military personnel, but annuities under the Civil Service Retirement Act, towards which Dismuke had made contributions by way of deductions from his salary. The two situations are wholly unrelated, as the *Dismuke* opinion points out in detail (297 U. S. at 170).

2. Even if Section 5 of the Act of April 3, 1939, can be construed to create a right in petitioner to retirement pay, it is well settled that Congress is not bound to provide a judicial remedy for such rights, but can limit claimants

to an exclusive administrative procedure. *Lynch* v. *United States,* 292 U. S. 571, 582, and cases there cited; *Morgan* v. *United States,* 115 F. 2d 426 (C. C. A. 5). The present case does not differ materially from *Denby* v. *Berry,* 263 U. S. 29, cited by the district court (R. 32). There a Naval Reserve Officer permanently disabled in line of duty was honorably discharged from active service without having his case referred to a retiring board. The officer sought mandamus to compel the Secretary of the Navy to revoke the release order and to send the officer before a retiring board. Though the argument was made that the officer was entitled as of right to retirement on pay, and that this right should be secured by the courts, this Court refused to interfere, since an exclusive administrative remedy had been provided by statute. The circumstance that the officer in that case sought relief by way of mandamus rather than, as here, in an action for money damages, is not material; in both cases, the prayer in this Court is, in substance, to remove the administration of reserve officers' retirement pay into the courts, and out of the hands of the executive department to which it has been entrusted by the Congress.

3. In this case, there was available to petitioner a complete system of administrative review in the War Department—of which he seems not to

have availed himself.[2] Executive Order 8099 of April 28, 1939, as amended by Executive Order 8461 of June 28, 1940 (Appendix, *infra*, pp. 11–12), provides that with regard to retirement pay, under Section 5 of the Act of April 3, 1939, as amended, "the determination of all questions of eligibility for the benefits thereof, including all questions of law and fact relating to such eligibility, shall be made by the Secretary of War" in the manner provided for Regular Army personnel. Section 302 (a) of the Servicemen's Readjustment Act of 1944, 38 U. S. C. Supp. V 693i (a) (Appendix, *infra*, pp. 10–11), directs the Secretary of War to establish boards of review, whose duty it is to review the findings and decision of a retiring board "at the request of any officer retired or released to inactive service without pay, for physical disability pursuant to the decision of a retiring board." In addition to the service records of the officer in question, such other evidence as the officer may present shall be considered. The proceedings and decision of the reviewing board are to be transmitted to the

[2] It should be noted that the district court found that in this case it was not clear whether the question of petitioner's right to retirement pay was still pending before the War Department or whether petitioner's claim had been denied by the War Department (R. 32). The district court further found that petitioner had apparently failed to take advantage of the available administrative procedure within the War Department (R. 32).

Secretary of War to be laid before the President for his approval and orders.

It follows that, although Congress has provided petitioner with no judicial forum, it has established ample remedial procedures within the War Department. Those procedures, in the circumstances of the present case, constitute the sole avenue of relief available to him.

CONCLUSION

The decision below was clearly correct, and there is no conflict. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.
JOHN F. SONNETT,
Assistant Attorney General.
FREDERICK BERNAYS WIENER,
Special Assistant to the Attorney General.
SAMUEL D. SLADE,
JANE A. PARKER,
Attorneys.

MARCH 1947.

APPENDIX

The Tucker Act, now Section 24 (20) of the Judicial Code, 28 U. S. C. 41 (20), insofar as here relevant, provides as follows:

> The district courts shall have original jurisdiction * * * Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States * * *. Nothing in this paragraph shall be construed as giving to either the district courts or the Court of Claims jurisdiction * * * to hear and determine claims for pensions * * *.

Sec. 5 of the Act of April 3, 1939, as amended, 53 Stat. 557, 1079, 10 U. S. C. 456, provides in part:

> all officers, warrant officers, and enlisted men of the Army of the United States, other than the officers and enlisted men of the Regular Army, if called or ordered into the active military service by the Federal Government for extended military service in excess of thirty days, other than for service with the Civilian Conservation Corps, and who suffer disability or death in line of duty from disease or injury while so employed shall be deemed to have been in the active military service during such period and shall be in all respects entitled to receive the same pensions, compensation,

retirement pay, and hospital benefits as are now or may hereafter be provided by law or regulation for officers and enlisted men of corresponding grades and length of service of the Regular Army.

Section 302 of the Serviceman's Readjustment Act of 1944, 58 Stat. 287, 38 U. S. C. Supp. V 693i, provides, in pertinent part, as follows:

(a) The Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury are authorized and directed to establish, from time to time, boards of review composed of five commissioned officers, two of whom shall be selected from the Medical Corps of the Army or Navy, or from the Public Health Service, as the case may be. It shall be the duty of any such board to review, at the request of any officer retired or released to inactive service, without pay, for physical disability pursuant to the decision of a retiring board, the findings and decision of such retiring board. Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer. Witnesses shall be permitted to present testimony either in person or by affidavit and the officer requesting review shall be allowed to appear before such board of review in person or by counsel. In carrying out its duties under this section such board of review shall have the same powers as exercised by, or vested in, the retiring board whose findings and decision are being reviewed. The proceedings and decision of each such board

of review affirming or reversing the decision of the retiring board shall be transmitted to the Secretary of War, the Secretary of the Navy, or the Secretary of the Treasury, as the case may be, and shall be laid by him before the President for his approval or disapproval and orders in the case.

* * * * *

(c) As used in this section—

(1) the term "officer" means any officer subject to the laws granting retirement for active service in the Army, Navy, Marine Corps, or Coast Guard, or any of their respective components;

* * * * *

Executive Order 8099, promulgated April 28, 1939, as amended by Executive Order 8461, promulgated June 28, 1940 (C. F. R., Cum. Supp., Title 3, pp. 482 and 680), provides:

Whereas section 1 of the act of August 30, 1935, c. 830, 49 Stat. 1028, as amended by section 5 of the act entitled "An Act to provide more effectively for the national defense by carrying out the recommendations of the President in his message of January 12, 1939, to the Congress," approved April 3, 1939 (Pub., No. 18, 76th Congress), provides, in part, as follows:

"* * * That all officers, warrant officers, and enlisted men of the Army of the United States, other than the officers and enlisted men of the Regular Army, if called or ordered into the active military service by the Federal Government for extended military service in excess of thirty days, and who suffer disability or death in line of duty from disease or injury while so employed shall be deemed

to have been in the active military service during such period and shall be in all respects entitled to receive the same pensions, compensation, retirement pay, and hospital benefits as are now or may hereafter be provided by law or regulation for officers and enlisted men of corresponding grades and length of service of the Regular Army.";

Whereas the said act is silent as to what agency shall administer the benefits provided thereby; * * *

Now, therefore, by virtue of the authority vested in me as President of the United States, and by the act of July 3, 1930, c. 863, 46 Stat. 1016, the duties, powers, and functions incident to the administration and payment of the benefits provided by the statute as above set out are hereby vested in the Veterans' Administration: *Provided,* That in the administration of the retirement-pay provisions of the said statute, the determination of all questions of eligibiity for the benefits thereof, including all questions of law and fact relating to such eligibility, shall be made by the Secretary of War, or by someone designated by him in the War Department, in the manner, and in accordance with the standards, provided by law, or regulations for Regular Army personnel.

U. S. GOVERNMENT PRINTING OFFICE 1941